MOTION FILED
MAY 16 1986

(4)

No. 85-1544

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

---

BURLINGTON NORTHERN, INC.,
*Petitioner,*

v.

JACK D. ANDERSON,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana**

---

## MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS, NATIONAL RAILWAY LABOR CONFERENCE, AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

---

DAVID P. LEE
NATIONAL RAILWAY LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

HENRY M. MOFFAT
NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL
881 Alma Real Drive, Suite 103A
Pacific Palisades, CA 90272
(213) 459-7659

J. THOMAS TIDD
KENNETH P. KOLSON *
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

May 16, 1986

* Counsel of Record

---

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1544

BURLINGTON NORTHERN, INC.,
*Petitioner,*

v.

JACK D. ANDERSON,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana**

## MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS, NATIONAL RAILWAY LABOR CONFERENCE, AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The Association of American Railroads ("AAR"), National Railway Labor Conference ("NRLC"), and National Association of Railroad Trial Counsel ("NARTC") respectfully move this Court for leave to file the attached Brief *Amici Curiae*.[1] The AAR and supporting railroad organizations have limited such requests to instances where issues of overriding concern to the industry are involved and such requests have generally been granted.[2]

[1] Petitioner has consented to the filing of the brief. The letter signifying this consent has been filed with the Clerk. Respondents have withheld consent. The brief is timely filed under the Rules of the Supreme Court which require filing within the time allowed for the filing of the brief in opposition (Rule 36.1). Pursuant to the extension of time requested by Respondent and granted by this Court, respondent's brief in opposition is due on May 16, 1986.

[2] *See Burlington Northern Inc. v. Herold*, No. 85-186 (filed August 30, 1985); *Burlington Northern Railroad Company v.*

The Court has generally permitted the participation of industry associations in cases such as this, which involve issues of special concern to the industry as a whole.[3]

The AAR is the trade association for the nation's railroads. Its members employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States.[4] AAR represents its members before courts, agencies and the U.S. Congress when matters of common concern are at issue.

The NRLC, whose members include almost all of the nation's Class I railroads, represents the industry both in national collective bargaining pursuant to the Railway Labor Act and in regard to other labor-management relations problems that are of concern to the railroads generally. The NARTC is a voluntary, unincorporated nonprofit organization composed of over 1,200 trial lawyers who represent all of the significant railroads operating throughout the United States.

The decision of the Montana Supreme Court in this case will have a serious adverse effect on the railroad industry as a whole. In its ruling, the Montana Supreme Court, based on a misconstruction of Section 5 of the Federal Employers' Liability Act ("FELA") (which section prohibits a railroad from exempting itself from

---

*Cosby*, No. 84-1313 (filed March 18, 1985); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 450 U.S. 336 (1982); *Kassel v. Consolidated Freightways Corp.*, 449 U.S. 897 (1980); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 885 (1977).

[3] *See, e.g., Western Airlines v. California*, 53 U.S.L.W. 3484 (U.S. Jan. 7, 1985) (Motion of Air Transport Association of America for leave to file brief amicus curiae granted); *Peick v. Pension Benefit Guaranty Corp.*, 465 U.S. 1098 (1984) (American Trucking Association).

[4] A listing of the membership of the Association appears at Appendix A to the attached brief.

FELA liability), voided a provision of a collective bargaining agreement that specifically provides for an offset from employee medical expense awards in a FELA action of medical benefits provided by railroad employers to their employees pursuant to an employer-funded industry medical insurance plan covering on-duty employee injuries. In voiding the collective bargaining agreement and allowing employees in a FELA action to recover twice for medical expenses previously paid by their employers, the decision below both improperly interferes with the collective bargaining process and unnecessarily and unjustifiably imposes substantial, duplicative medical expense costs on the railroad industry for on-duty employee injuries.

The consequences of this decision will be felt by the entire railroad industry, not just by the individual railroad involved in the litigation below. Because they represent the railroad industry as a whole, the AAR, NRLC and NARTC are in a position to convey the industry's concern with this decision and to present factual information which will underscore that concern. Thus, the AAR, NRLC and NARTC respectfully submit that their participation as *amici curiae* will assist the Court in resolving this case by providing a broad prospective on the decision below and its impact on the railroad industry.

Respectfully submitted,

DAVID P. LEE
NATIONAL RAILWAY LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

HENRY M. MOFFAT
NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL
881 Alma Real Drive, Suite 103A
Pacific Palisades, CA 90272
(213) 459-7659

J. THOMAS TIDD
KENNETH P. KOLSON *
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

May 16, 1986

* Counsel of Record

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF THE AMICI CURIAE | 1 |
| SUMMARY OF ARGUMENT | 3 |
| I. The Decision Below, that Section 5 of FELA Invalidates a Collective Bargaining Agreement Requiring a Set-off of Prior Payments of Medical Expenses under the Industry's Health and Welfare Plan, Seriously Misconstrues Section 5 and Reflects a Recurring Conflict in the Lower Courts That Should be Resolved by this Court | 5 |
| A. Background—The 1975 Collective Bargaining Agreement at Issue was Specifically Adopted to Redress the Double Recovery Problem Arising from Conflicting Court Decisions | 5 |
| B. The Longstanding Conflict in the Lower Courts Permitting Double Recovery of Medical Expenses Has Not Been Resolved by the 1975 Collective Bargaining Agreement and Can Only Be Definitively Resolved by this Court | 13 |
| C. The Decision Below Seriously Misconstrues Section 5 | 14 |
| D. The Decision of the Court Below Conflicts with Important Policy Objectives Underlying FELA and the Collective Bargaining Process | 18 |
| CONCLUSION | 20 |
| Appendix A: Members of the Association of American Railroads | 1a |
| Appendix B: | 11a |

## TABLE OF AUTHORITIES

*CASES* Page

*Banks v. Central of Georgia Railroad Co.*, Civ. No. 8308 (Muscogee Cty., Ga., Feb. 24, 1981) ..... 13
*Blake v. Delaware and Hudson Railway Co.*, 484 F.2d 204 (2d Cir. 1973) ..... 9, 10, 11, 13, 17
*Chicago & North Western Railway v. United Transportation Union*, 402 U.S. 570 (1971) ..... 20
*Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984) ..... 13, 18, 19
*Diaz v. Indiana Harbor Belt Railroad Co.*, Civ. No. H79-13 (N.D. Ind. Dec. 1, 1985) ..... 13
*Folkestad v. Burlington Northern, Inc.*, No. CV-83-84-BLG (D. Mont., Sept. 30, 1985), *appeal pending*, Nos. 85-4280 and 4305 (9th Cir.) ..... 13
*Hall v. Minnesota Transfer Railway Co.*, 322 F. Supp. 92 (D. Minn. 1971) ..... 2, 9, 10
*Haughton v. Blackship*, 462 F.2d 788 (5th Cir. 1972) ..... 9
*Herbst v. Burlington Northern Railroad Co.*, CV-84-51-BLG (D. Mont., April 22, 1985) ..... 13
*Lesinski v. Norfolk & Western Railway Co. and Conrail*, No. H-9307 (Supreme Ct. N.Y., June 11, 1982) ..... 13
*Lopez v. Southern Pacific Transportation Co.*, 1 Civ. No. 40048 (Cal. App. 1977) ..... 13
*Lucht v. Chesapeake & Ohio Railway Co.*, 489 F. Supp. 189 (W.D. Mich. 1980) ..... 10, 11
*Morrison-Knudson Construction Co. v. Director, OWCP*, 461 U.S. 624 (1983) ..... 7
*Nelson v. Penn Central Railroad Co.*, 415 F.Supp. 225 (N.D. Ohio 1976) ..... 9, 10, 18
*Patterson v. Norfolk & Western Railway Co.*, 489 F.2d 303 (6th Cir. 1973) ..... 9, 10
*Philadelphia, Baltimore & Washington Railroad v. Schubert*, 224 U.S. 603 (1921) ..... 15
*Rogers v. Chicago & North Western Transportation Co.*, 59 Ill. App. 3d 911, 375 N.E. 2d 952 (Ill. App. 1978) ..... 9
*Royster Company v. United States*, 432 F.Supp. 375 (E.D. Va. 1972) ..... 7

TABLE OF AUTHORITIES—Continued

Page

*Southern Pacific Transportation Co. v. Allen*, 525 S.W. 2d 300 (Tex. Civ. App. 1975) ..... 11
*Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793 (4th Cir. 1970) ..... 13, 18
*Thomas v. Penn Central Co.*, 379 F.Supp. 24 (W.D. Penn. 1974) ..... 7, 9, 10, 18
*UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982) ..... 20
*Urbaniak v. Erie Lackawanna Railway Co.*, 424 F.Supp. 981 (W.D. N.Y. 1977) ..... 9, 11, 18
*Wagner v. Reading Co.*, 428 F.2d 289 (3rd Cir. 1970) ..... 9

STATUTES

Boiler Inspection Act, 45 U.S.C. §§ 22 et seq. (1982) ..... 14
Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), 45 U.S.C. § 55 (1982) ..... *passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) .... 15
40 Cong. Rec. 4607 (1906) ..... 16
40 Cong. Rec. 7661 (1906) ..... 16
40 Cong. Rec. 7662 (1906) ..... 15, 16
40 Cong. Rec. 7696 (1906) ..... 16
40 Cong. Rec. 7915-20 (1906) ..... 6, 16
42 Cong. Rec. 4427 (1908) ..... 16
42 Cong. Rec. 4527 (1908) ..... 15

MISCELLANEOUS

E.R. Johnson, *Railway Departments for the Relief and Insurance of Employes*, 162 Annals of Amer. Acad. Pol. & Soc. Sci. 424, 429-432 (1895) ..... 5
Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966) ..... 11
McDowell, *The Collateral Source Rule—The American Medical Association and Tort Reform*, 24 Washburn L.J. 205 (1985) ..... 11

TABLE OF AUTHORITIES—Continued

Page

Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (U.S. Attny. Gen., February 1986) ..... 11

Schwartz, *The Collateral Source Rule,* 41 B.U.L. Rev. 348 (1961) ..... 11

Work Injuries in the Railroad Industry, 1938-40 (Rd. Retirement Bd. 1947) ..... 6

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

No. 85-1544

---

BURLINGTON NORTHERN, INC.,
*Petitioner*,

v.

JACK D. ANDERSON,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana**

---

## BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS, NATIONAL RAILWAY LABOR CONFERENCE, AND NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

---

### INTEREST OF THE AMICI CURIAE [1]

The Association of American Railroads ("AAR") is the trade association for the nation's railroads. Almost all of the nation's Class I railroads are members of the National Railway Labor Conference and are represented by the Conference in national collective bargaining pursuant to the Railway Labor Act. The National Association of Railroad Trial Counsel ("NARTC") is a volun-

---

[1] Petitioner has consented to the filing of this brief pursuant to Rule 36 of the Supreme Court rules. Respondent withheld consent. A motion for leave to file this brief therefore accompanies the brief.

tary, unincorporated nonprofit organization composed of over 1,200 trial lawyers who represent all of the significant railroads operating throughout the United States.

The decision below represents the most recent of a recurring series of conflicting state and federal court decisions construing the applicability of Section 5 of the Federal Employers' Liability Act ("FELA")[2] in the context of employer-provided medical benefits. In its decision below, the Montana Supreme Court has interpreted Section 5 of FELA to invalidate a collective bargaining agreement providing for a set-off against employee FELA recoveries of employer-paid medical expenses under a railroad industry Health and Welfare Plan administered by the Travelers' Insurance Company (GA-23000). The Montana Supreme Court held that Section 5 "broadens application of the collateral source rule"[3] in FELA cases involving a medical insurance plan to allow a set-off only of "the premiums, not what the premiums bought." The Court further held that Section 5 does not permit a railroad employer to "contract away" its FELA liability for payment of employee medical expenses even though those expenses have already been paid by the employer pursuant to the insurance plan.

---

[2] 45 U.S.C. § 55 (1982). Section 5 prohibits "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability [under FELA]. . . ." A proviso to Section 5 states that, notwithstanding this general prohibition, a railroad may set off in any FELA suit "any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee . . . on account of the injury or death for which said action was brought."

[3] The collateral source rule provides that a tortfeasor cannot reduce the amount of his liability upon a judgment for an injured plaintiff by reason of compensation or insurance proceeds paid to the plaintiff from a collateral source independent of the tortfeasor. *Hall v. Minnesota Transfer Ry. Co.*, 322 F. Supp. 92, 94-95 (D. Minn. 1971).

The ruling of the Montana Supreme Court, which is neither warranted in law, equity, nor logic and which conflicts with decisions of other state and federal courts, has the effect of requiring railroad employers to pay twice for the medical treatment of employees who are injured on the job and of voiding an express agreement between rail management and labor to resolve in a mutually satisfactory manner a longstanding and recurring "double recovery" problem created by conflicting court decisions construing Section 5. As such, the decision below directly impedes the efforts of *amici curiae*, on behalf of the railroad industry, to prevent the imposition of costly, duplicative and unnecessary damage awards in FELA cases and to preserve the sanctity of collective bargaining agreements in defining and qualifying the scope of employee health and welfare benefits payable by railroad employers. The AAR, NRLC, and NARTC therefore strongly support the petition for a writ of certiorari.

## SUMMARY OF ARGUMENT

The treatment under Section 5 of FELA of medical expense payments made by railroad industry employers to their employees for on-duty injuries pursuant to the industry's employer-funded Health and Welfare Plan has been a longstanding source of conflict in the lower courts. Although many courts have properly viewed the industry insurance plan as providing a source of funds through which the railroad employer may fully satisfy its FELA obligations for the payment of employee medical expenses, other courts have considered on-duty medical expenses paid pursuant to the insurance plan as an employee "fringe benefit" and have allowed an employee in a FELA action to "recover" such medical expenses a second time under the "collateral source" rule.

The 1975 collective bargaining agreement at issue in the instant case was intended by both rail management and labor to definitively resolve the longstanding "double

recovery" problem by making clear that medical expense payments under the industry plan for on-duty injuries are not intended as an employee fringe benefit and are provided with the qualification that such payments be offset from any subsequent award of medical expenses under FELA. Despite the clear language and intent of the collective bargaining agreement, however, the lower courts are still split on the employee's "right" to a double recovery under Section 5 of FELA. While most courts appear to enforce the offset provision of the collective bargaining agreement, other courts, such as in the decision below, have instead voided the offset provision as violative of Section 5. The longstanding, recurring conflict in the lower courts over the treatment of employee medical expenses under FELA requires intervention by this Court if the railroad industry is not to be subjected to costly and wholly unwarranted duplicative medical expense payments in FELA actions.

Moreover, the decision below and those of other courts voiding the collective bargaining offset provision seriously misconstrue Section 5 of FELA and conflict with important federal policy objectives. Contrary to the decision below, the industry medical expense plan is not an effort to "contract away" FELA liability, but is simply an effort by the industry to provide employee medical benefits *in addition* to those required by FELA for on-duty injuries (i.e., regardless of employer fault) while concomitantly ensuring that the railroad employer will be required to pay only *once* for medical expenses covered by FELA. As such, the general prohibition set forth in Section 5 against an employer "exempting" itself from FELA liability is not implicated by the industry's medical insurance plan, and the proviso to Section 5 relied upon by the court below to define the permissible employer set-off allowed by Section 5 is wholly irrelevant to this case. Indeed, voluntary employer-paid medical insurance plans such as GA-23000 serve, rather than impede, the objectives of FELA by ensuring the provision of medical

expense benefits to employees and should not be discouraged or jeopardized by making such plans twice as expensive to provide as would the decision of the court below.

Further, by voiding the collective bargaining offset provision and requiring duplicative payments of medical expenses contrary to the intentions of the parties, the court below has not only improperly construed the requirements of FELA, but has also violated the strong federal policy against judicial intrusion into the collective bargaining process. Because of the economic significance of this case to the railroad industry and the serious policy implications of the decision below, resolution of the longstanding controversy underlying the administration of Section 5 of FELA is required by this Court.

## I. The Decision Below, That Section 5 of FELA Invalidates a Collective Bargaining Agreement Requiring a Set-Off of Prior Payments of Medical Expenses under the Industry's Health and Welfare Plan, Seriously Misconstrues Section 5 and Reflects a Recurring Conflict in the Lower Courts That Should Be Resolved By This Court

### A. *Background—The 1975 Collective Bargaining Agreement at Issue Was Specifically Adopted to Redress the Double Recovery Problem Arising From Conflicting Court Decisions*

The railroad industry has traditionally paid for the medical care of employees who are injured on the job. Railroad "relief departments" were established as early as 1880 in order to assist injured employees with medical expenses and thereby serve the railroads' interest in the health and morale of their workforce.[4] As the Petition relates, one practice of the relief departments did

[4] *See* E.R. Johnson, *Railway Departments for the Relief and Insurance of Employes*, 162 Annals of Amer. Acad. Pol. & Soc. Sci. 424, 429-432 (1895).

draw Congress' disapproval in the enactment of FELA at the turn of the century: in response to the urging of the employees' organizations Congress invalidated in Section 5 the use of contracts whose purpose or intent was to exempt the railroad from liability, such as form contracts releasing the railroad from liability as a condition of receiving benefits from the relief departments. *See* Petition at 16. At the same time, however, the employees' organizations acknowledged that the railroads were providing financial assistance to injured employees and should receive due credit:

> From a moral standpoint, we think it only just and fair that the carrier should be given credit for such amounts as it has actually paid to an injured employee on account of such injury.

Letter from H.R. Fuller to Senator LaFollette (June 2, 1906), *reprinted in* 40 Cong. Rec. 7919-20 (1906). As a result of this statement, Congress included in Section 5 a proviso preserving the railroads' right to set-off from FELA awards the portion of benefits paid to injured employees to which the railroads had contributed. *See* Petition at 17 n. 28, 18-19.

In the early plans, both the employees and the railroads contributed to the cost of medical care. Between the enactment of Section 5 in 1906 and the 1950's, the practice with respect to medical care had evolved to the point that, at least with respect to on-duty injuries, the railroads alone generally were paying the full costs.[5] This trend carried over to the health and welfare plan established in the 1950's.

Thus, when the modern health and welfare plan was negotiated in the 1950's and 60's, the unions insisted that on-duty injury coverage for medical expenses not be paid out of the compensation allocated for each worker for

---

[5] *See Work Injuries in the Railroad Industry, 1938-40,* 178 (Rd. Retirement Bd. 1947).

fringe benefits. *See, e.g., Thomas v. Penn Central Company*, 379 F. Supp. 24, 26-27 (W.D. Penn. 1974). The agreements reached between the railroads and their unions therefore expressly provided that, while many of the benefits of the plan were to be considered "fringe benefits" in lieu of wages, on-duty injury coverage was to be handled by the railroads separately and would not be charged against the funds available for employee compensation.[6]

The majority of the railroads presently arrange for the administration and payment of employee medical expenses for on-duty injuries through Group Policy No. GA-23000 ("GA-23000"), offered by the Travelers Insurance Company.[7] GA-23000, which has been in effect

---

[6] *See* Agreement of August 19, 1960, Art. V § 1(d)(1) ("premium[s] for the insurance benefit payments resulting from on-duty injuries . . . are not considered as wage equivalents"); letter from G.E. Leighty to J.P. Tahney, *et. al.* (Sept. 16, 1960) ("the increased cost to all railroads, whether non-hospital or hospital association railroads, is 810.77 per month per employee, $9.96 of which is considered to be in lieu of a wage increase in early 1961 and 81¢ for on-duty injury coverage which is considered a carrier liability") (Appendix B at ~~14a~~ 16a); letter from National Railway Labor Conference to L.J. Wagner and C. Luna (March 26, 1964) ("The Carriers shall definitely assume the entire cost of the on-duty injuries cost factor after the expiration of the initial two-year Policy.") (Appendix B at ~~17a~~ 19a).

The cost of providing on-duty injury coverage is accordingly a general labor cost that is not part of an employees' compensation. *Cf. Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624 (1983) (contributions to employee benefit trust funds not "wages" under Longshoremen's and Harbor Workers' Compensation Act); *Royster Company v. United States*, 342 F.Supp. 375 (E.D. Va. 1972) (reimbursement of expenses incurred by employees in connection with business travel is not compensation).

[7] While a majority of railroad employees are covered by GA-23000 a number of major railroads still utilize employee hospital associations for treating, or reimbursing the medical expenses associated with, on-duty injuries. These railroads reimburse the hospital associations under various arrangements. Other railroads make

since 1955, is financed by employer contributions into a trust fund of amounts determined to be sufficient to pay the anticipated cost of employee medical expenses for on-duty injuries plus additional amounts for claims administration and the purchase of insurance to cover claims in excess of that satisfied by the trust fund.[8] When an employee incurs an on-duty injury, the railroad either pays the resulting medical bills in full and seeks reimbursement from Travelers under GA-23000 or forwards the bills to Travelers for payment. Any medical expenses not covered by GA-23000 are paid directly by the railroad employer.

Notwithstanding that employee medical expenses for on-duty injuries are wholly paid for by the employer under the GA-23000 plan and that the employee in fact incurs no medical expenses that must be reimbursed in a FELA action, employees have often sought to recover as an element of damages in a FELA case the cost of medical treatment rendered in conjunction with an on-duty injury. The issue of whether the employee is entitled to "recover" for such medical expenses has been resolved in conflicting fashion by various state and federal courts with the outcome generally dependent on conflicting application of the collateral source rule to benefits paid under GA-23000 and conflicting interpretations of the requirements of Section 5 of FELA.

Courts which have permitted FELA plaintiffs to plead medical expenses as an element of damages (while pro-

---

direct payments of medical expenses to employees or use an insurance program other than GA-23000. It is a universal practice, however, for the railroads to pay medical expenses for on-duty injuries.

[8] GA-23000 also provides medical benefits to employees for off-duty injuries as well as certain life insurance and accidental death and dismemberment benefits. The premiums for these employee benefits are paid separately from those for on-duty medical expenses and are subject to a separate experience rating.

hibiting a showing that such expenses were paid by the railroad) have concluded that the GA-23000 policy is a fringe benefit provided by the employer in partial consideration for services rendered by the employee. As such the medical benefits paid on the employee's behalf pursuant to the GA-23000 policy have been considered a collateral source and not allowed as an offset to employee FELA recoveries.[9] Often in these cases provisions of applicable collective bargaining agreements were either not before the court, or were deemed insufficient to rebut the view that payment of medical expenses under the policy constituted a fringe benefit.[10]

Other courts have found that the GA-23000 policy is not a collateral source and have prohibited a double recovery. In so holding these courts have noted that in addition to being funded entirely by the railroad employer, the GA-23000 policy serves the important purpose of providing the railroad employer with funds with which to pay its FELA liability pertaining to employee medical expenses.[11] As generally noted by the courts, policies of indemnity do not fall within the collateral source rule.[12]

---

[9] See, e.g., *Patterson v. Norfolk & Western Ry. Co.*, 489 F.2d 303, 308 (6th Cir. 1973); *Blake v. Delaware and Hudson Ry. Co.*, 484 F.2d 204 (2d Cir. 1973); *Urbaniak v. Erie Lackawanna Ry. Co.*, 424 F.Supp. 981 (W.D. N.Y. 1977); *Hall* v. *Minnesota Transfer Railway Company*, 322 F.Supp. 92, 96 (D. Minn. 1971). *See also, Haughton v. Blackship*, 462 F.2d 788 (5th Cir. 1972) (application of collateral source rule to retirement benefits in Jones Act action).

[10] See, e.g., *Patterson v. Norfolk & Western Ry. Co., supra*; *Blake v. Delaware and Hudson Ry. Co., supra*; *Urbaniak v. Erie Lackawanna Ry. Co., supra.*

[11] *Nelson v. Penn Central R. Co.*, 415 F.Supp. 225, 227 (N.D. Ohio 1976); *Thomas v. Penn Central Company*, 379 F. Supp. 24, 27 (W.D. Penn. 1974); *cf. Wagner v. Reading Company*, 428 F.2d 289 (3rd Cir. 1970); *Rogers v. Chicago & North Western Transportation Co.*, 59 Ill. App. 3d 911, 375 N.E. 2d 952, 957-958 (Ill. App. 1978).

[12] *Nelson v. Penn Central R. Co.*, 415 F.Supp. at 227; *Thomas v. Penn Central Company*, 379 F.Supp. at 27-28; see also *Haughton v. Blackships, Inc.*, 462 F.2d 788, 791 (5th Cir. 1972).

In addition, in several of these cases the court had before it, and gave full effect to, a provision of an applicable collective bargaining agreement describing premiums paid by the railroad employer for the GA-23000 policy as "not considered as wage equivalents." [13]

Courts considering the status of medical payments made pursuant to GA-23000 have conflicted not only with respect to whether such payments constituted fringe benefits within the scope of the common law collateral source rule, but also with respect to the requirements of the proviso to Section 5 of FELA pertaining to permissible set-offs. Thus the courts, in inconsistent fashion, have characterized Section 5 as simply incorporating the common law collateral source rule; [14] as modifying the common law rule to allow set-off of enumerated employer payments set forth in the proviso "regardless of [their] status under the common law",[15] and as codifying the common law rule "in a FELA setting, the effect of which is to further broaden what is determined to be a "collateral source.' " [16] The latter viewpoint is epitomized in the concurring opinion of Circuit Judge Friendly in *Blake v. Delaware and Hudson Railway Company* (an opinion followed by other courts) :

> What constrains me to concur [that payments made under GA-23000 constitute a collateral source] is that

---

[13] See, e.g., *Nelson v. Penn Central R. Co., supra*; *Thomas v. Penn Central Company, supra* (Article V of August 19, 1960 collective bargaining agreement applicable to non-operating employees).

[14] *Cf. Nelson v. Penn Central R. Co.*, 415 F.Supp. at 226; *Thomas v. Penn Central Company*, 379 F.Supp. at 25; *Patterson v. Norfolk and Western Railway Company*, 489 F.2d at 307-308.

[15] *Hall v. Minnesota Transfer Railway Company*, 322 F.Supp. at 95.

[16] *Lucht v. Chesapeake & Ohio Ry. Co.*, 489 F.Supp. 189, 190 (W.D. Mich. 1980) (construing *Blake v. Delaware and Hudson Railway Company*, 484 F.2d at 207 (concurring opinion of Friendly, J.))

> here we are governed not by federal common law but by statute. Under 45 U.S.C. § 55 the railroad is entitled to set off only the premiums, not what the premiums bought. . . . If the railroads wish to avoid the harsh result [of employee double recovery of medical expenses] they can accomplish this by specific provision in the collective bargaining agreement.

484 F.2d at 207; *see also*, e.g., *Urbaniak v. Erie Lackawanna Ry. Co.*, 424 F. Supp. at 981 (W.D.N.Y. 1977); *Lucht v. Chesapeake & Ohio Ry. Co.*, 489 F. Supp. at 190; *Southern Pacific Transportation Co. v. Allen*, 525 S.W. 2d 300, 307 (Tex. Civ. App. 1975).[17]

Because of the inconsistent treatment by the courts of GA-23000 with regard to whether it is a "collateral source" for FELA purposes, and as a result of Judge Friendly's suggestion in *Blake* for resolving the controversy, the railroads entered into a Health and Welfare

---

[17] The wisdom of the collateral source rule has itself been questioned. Forcing a defendant to pay full damages even though part of those alleged expenses have been paid by another source clearly creates a windfall for plaintiffs. For this reason and others, many commentators have advocated abolition of the collateral source rule. *See e.g.*, McDowell, *The Collateral Source Rule—The American Medical Association and Tort Reform*, 24 Washburn L.J. 205 (1985); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966); Schwartz, *The Collateral-Source Rule*, 41 B.U.L. Rev. 348 (1961).

Most recently, a report prepared by the Justice Department in cooperation with other federal agencies concluded that the collateral source rule cannot be justified on policy grounds and that its elimination would contribute significantly to easing the liability insurance crisis being felt in many sectors of the economy. *See* Report of the Tort Policy Working Group on the causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, 70-72 (February 1986). Inasmuch as the measure of damages in FELA cases is a matter of federal law, and the collateral source rule is judicially created doctrine, this case provides an opportunity to consider the value and scope of that rule in tort cases governed by federal law.

Agreement with the major railroad employee unions in October 1975. App. at 25a. Article III of the agreement specifically provided, with the stated intent of avoiding duplicative payments of medical expenses to employees, that "[b]enefits provided under the policy contract [GA-23000] will be offset against the right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the policy contract." The parties also confirmed the intended operation of their agreement in several letters, one of which, a March 12, 1975 letter from Mr. William H. Dempsey of the NRLC to Mr. John Peterpaul of the International Association of Machinists, was introduced in the record below.[18] That letter contained the following example of the set-off provision:

> An employee is injured on duty. He sues the employer for $10,000 and includes in his claim $1,000 of medical expenses which have already been paid under GA-23,000. If he wins the suit, he should collect $9,000, not $10,000, for otherwise he would be collecting twice for the same thing.

This letter also makes clear that the railroads identified this set-off, among other provisions, as a condition of continuing the benefits provided under GA-23,000 and that without such an assurance the on-duty injury coverage might well have been discontinued.

The 1975 Health and Welfare Agreement accordingly merely made explicit what had been assumed for decades —that the on-duty injury coverage was to be provided wholly at the railroads' expense and was not part of employee compensation. Just as in 1906, the unions acknowledged in the 1975 Agreement that the railroads were entitled to credit for benefits provided at their expense.

---

[18] *See* Defendant's Brief in Opposition to Plaintiff's Motion in Limine at 9 (Exhibit attached at Appendix B at 20a-~~21a~~).

19a -

### B. *The Longstanding Conflict in the Lower Courts Permitting Double Recovery of Medical Expenses Has Not Been Resolved By the 1975 Collective Bargaining Agreement And Can Only Be Definitively Resolved By This Court*

Despite the 1975 collective bargaining agreement making crystal clear that medical expenses paid by railroad employers pursuant to GA-23000 are not intended to be duplicative of FELA awards and must be offset from any subsequent employee right of recovery under FELA for medical expenses, the lower courts are still split on the employee's "right" to a double recovery under Section 5 of FELA. While most courts that have considered the issue appear to enforce the collective bargaining agreement pursuant to its terms,[19] other courts, as in the instant case, have instead voided the collective bargaining agreement.[20] The rationale of such cases rests in the popularized dictum of the *Blake* case (incorporated as holdings in various decisions) that Section 5 "broadens application of the collateral source rule" in FELA cases to allow set-off only of "the premiums, not what the premiums bought." App. at 11a-12a. In the view of these courts, because the 1975 collective bargaining agreement seeks to "contract away" benefits otherwise payable to an employee under FELA (i.e., employee medical expenses

---

[19] See, e.g., *Diaz v. Indiana Harbor Belt RR Co.*, Civ. No. H 79-13 (N.D. Ind., Dec. 1, 1985) (Pet.'s App. at 41a-45a); *Lesinski v. Norfolk & Western Ry. Co. and Conrail*, No. H-9307 (Supreme Ct., N.Y.; June 11, 1982); *Banks v. Central of Georgia RR Co.*, Civ. No. 8308 (Muscogee Cty. Ct., Ga., Feb. 24, 1981); *Cf. Clark v. Burlington Northern Inc.*, 726 F.2d 448, 451 (8th Cir. 1984); *Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793, 794-95 (4th Cir. 1970).

[20] See, e.g., *Folkestad v. Burlington Northern, Inc.*, No. CV-83-84-BLG (D. Mont., Sept. 30, 1985), *appeal pending*, Nos. 85-4280 & 4305 (9th Cir.); *Herbst v. Burlington Northern RR Co.*, CV-84-51-BLG (D. Mont., April 22, 1985) (Pet.'s App. at 32a-33a); *Lopez v. Southern Pacific Transp. Co.*, 1 Civ. No. 40048 (Cal. App. 1977) (Pet.'s App. at 34a-40a).

paid though "collateral sources") the agreement is violative of the general prohibition of Section 5 and is thus void to the extent it requires a set-off. App. at 11a-12a.

The railroads thus continue to face the same dilemma they faced prior to the 1975 agreement: Having obligated themselves to pay in full the medical bills of employees who are injured on the job, they have no assurance that they will not be required to pay those same expenses twice. Because the lower courts have been wholly unable to resolve the FELA medical benefits issue in consistent fashion in the absence of guidance from this Court, and because the instant case and other decisions voiding the 1975 collective bargaining agreement seriously misconstrue the requirements of Section 5 and otherwise disregard important public policy considerations, review of the decision below is imperative.

### C. *The Decision Below Seriously Misconstrues Section 5*

The decision of the court below, and similar decisions voiding the 1975 collective bargaining agreement, rest on a wholly erroneous construction of Section 5 of FELA and do serious damage to the legislative intent underlying Section 5. Indeed, the GA-23000 plan and the collective bargaining agreement at issue in the instant case serve to *implement* rather than impede the purpose for which FELA was enacted.

Pursuant to the requirements of FELA, 45 U.S.C. §§ 51 *et seq.* (1982), railroad employers are liable in damages for on-duty injuries sustained by their employees which are either caused by negligence of the employer or result from breach of obligations imposed on the employer by other federal statutes.[21] To ensure the rights of railroad employees under FELA against employer attempts to limit liability, Section 5 of FELA prohibits a

---

[21] See, e.g., 45 U.S.C. §§ 22 et seq. (1982) (Boiler Inspection Act of 1911).

railroad employer from exempting itself by contract or other device from liability created by FELA:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

As the legislative history of Section 5 makes clear, Congress' intent in prohibiting railroad efforts by contract or other device to exempt themselves from FELA liability was directed against such turn-of-the-century railroad practices as requiring employees to sign releases from personal injury claims as a condition of employment, requiring employees to join and contribute to employer-supported "relief associations" as an exclusive means of obtaining redress for on-duty injuries, as well as similar devices through which the railroads sought to exempt themselves from liability for personal injury claims of employees.[22] As the legislative history of Section 5 further establishes, the language of the proviso was specifically incorporated in Section 5 as a *protection to employers* to make clear that even if a contract or device violated the general prohibition, the railroad would still be entitled to recover, as a set-off from a FELA recovery, sums it had actually contributed to the employee on account of his injury through such prohibited contract or device.[23]

---

[22] See H.R. Rep. No. 1386, 60th Cong., 1st Sess. 6-9 (1908); see also *Phila., Balt. & Wash. R.R. v. Schubert,* 224 U.S. 603 (1912).

[23] See 40 Cong. Rec. 7662 (1906) (remarks of Mr. Gallinger); 42 Cong. Rec. 4527 (1908) (remarks of Mr. Dolliver); 40 Cong.

Considered in the light of the language, legislative history and purpose of Section 5, the decision of the court below is totally without foundation. First, far from constituting a device "the purpose or intent" of which is to exempt the railroad employer from FELA liability for employee injuries, the GA-23000 plan, which is fully funded by the railroad employer, is expressly intended to *provide* funds to employees who are injured on the job for the payment in full of their medical expenses. Indeed, medical benefits provided by the GA-23000 plan go *beyond* employer obligations under FELA. Railroads are not obligated by FELA to pay employee medical expenses in advance of a FELA judgment, nor are they required by FELA to pay employee medical expenses for on-duty injuries in situations where no liability under FELA is imposed. The GA-23000 plan affords railroad employees both these additional benefits while concomitantly providing railroad employers with funds to meet their potential FELA obligations for the payment of medical expenses.

Nor does Section 5 of FELA require that railroad employers pay twice for employee medical expenses for injuries covered by FELA. The 1975 collective bargaining agreement, by expressly qualifying the medical benefits payable to employees under GA-23000 to specifically require an offset in a FELA action of medical expenses previously paid by the policy, merely seeks to provide a means of ensuring the elimination of duplicative payments resulting from court decisions construing medical benefits paid pursuant to GA-23000 as a fringe benefit to which the employee is unqualifiedly entitled. As the 1975 collective bargaining agreement makes crystal clear, duplicative payments of employee medical expenses is

---

Rec. 7662 (1906) (remarks of Mr. Foraker); 42 Cong. Rec. 4427 (1908) (remarks of Mr. Sterling); 40 Cong. Rec. 4607 (1906) (remarks of Mr. Henry). See also Senate debate regarding proposal to delete the proviso, 40 Cong. Rec. 7661-62, 7696, 7915-20 (1906).

not intended by either railroad management or labor to be part of the employee's compensation package under the GA-23000 plan. Because the 1975 collective bargaining agreement merely defines the extent of the employer's obligation for the payment of medical expenses under GA-23000 and does not purport to exempt the railroad from liability for the payment of medical expenses under FELA, the Montana Supreme Court's decision voiding the collective bargaining agreement as violative of Section 5 is utterly without foundation in law or logic.

Second, the Court's construction of the proviso to Section 5, premised on the *Blake* dictum as engrafted onto the general caselaw, merely compounds the confusion in existing law regarding the construction of Section 5. As the language, legislative history and purpose of Section 5 clearly demonstrate, the proviso to Section 5 does not become relevant unless a particular contract or device is first found to be violative of Section 5. In that event, the proviso works to the benefit of the employer by allowing a set-off of payments made by the employer on the employee's behalf notwithstanding that the contract or device is voided to the extent that it seeks to exempt the employer from liability. The proviso is thus wholly irrelevant with respect to employer medical plans, such as the GA-23000 plan at issue, which construed on their own merits do not fall within the general prohibition of Section 5.

Contrary to the decision in the instant case and those of other courts voiding the collective bargaining agreement, the language of the proviso was never intended to "broaden application of the collateral source rule" to *define* in the first instance as a "collateral source" all plans for the payment of medical expenses administered by insurance companies, such as the GA-23000 plan. What constitutes a "collateral source" in the area of employee fringe benefits is first and foremost determined

by any applicable collective bargaining agreement, not by the proviso to Section 5.[24]

### D. *The Decision of the Court Below Conflicts With Important Policy Objectives Underlying FELA and the Collective Bargaining Process*

The decision of the court below voiding the offset provision of the 1975 collective bargaining agreement has serious policy implications regarding the application of FELA and the proper functioning of the collective bargaining process. Moreover, the instant controversy is of great economic significance to the railroad industry. Each of these factors requires resolution of the long-standing controversy underlying the administration of Section 5 of FELA by this Court.

The railroad industry makes a large annual investment for the specific purpose of paying the medical bills of employees who are injured on the job. In each of the last three years the railroad industry as a whole has contributed over $40 million to fund on-duty medical expense benefits.[25] The needs of employees are well

---

[24] See, e.g., *Urbaniak v. Erie Lackawanna Ry., supra*; *Nelson v. Central R.R. Co., supra*; *Thomas v. Penn Central Co., supra*; see also *Clark v. Burlington Northern, Inc.*, 726 F.2d at 451; *Thomas v. Humble Oil & Refining Co.*, 420 F.2d at 794-95.

Moreover, even if the proviso to Section 5 were deemed relevant to this case, the proviso allows a set-off of "any sum [a carrier] has contributed or paid to any insurance . . . that may have been paid to the injured employee. . . ." Since virtually all monies paid under GA-23000 to an employee are sums which have been paid by the carriers to the insurance company, or directly to the employee, the entire benefit received under the GA-23000 plan must be set-off under the proviso. The comment of the concurring opinion in the *Blake* case that only "premium" payments may be set-off is unduly restrictive and unsupported by the language of the proviso itself. The statute refers to "any sum" paid or contributed to any insurance relief benefit or indemnity. The payments are described generically, not in terms of "premiums" to an insurance company.

[25] In 1983 this amount was $40,639,703; in 1984, $45,331,839 and in 1985, $40,437,492. In addition the railroads also pay any balance not covered by the GA-23000 Policy.

served by this arrangement. It provides for prompt payment of medical bills for on-duty injuries thus alleviating the financial strain which the employee would otherwise have to bear until his FELA claim is either settled or litigated to judgment—a process which can take months or even years.[26]

The decision of the court below voiding the set-off provision of the 1975 collective bargaining agreement and permitting duplicative recoveries of medical expenses by employees can only serve to jeopardize the continued provision of these medical expense benefits by making such programs twice as costly to provide. In addition, disallowance of the collective bargaining agreement set-off not only needlessly imposes an additional and heavy economic burden on the railroad industry, but concomitantly makes it more difficult for the railroad industry to adequately fund its existing FELA medical expense obligations if it cannot be assured of using insurance programs such as GA-23000 as a funding vehicle without incurring duplicative obligations. Any reading of Section 5 of FELA which both provides a disincentive to employers to provide voluntary medical expense plans in excess of FELA requirements and at the same time lessens the ability of employers to meet their FELA obligations can only serve interests contrary to that which Section 5 was intended to promote. As succinctly stated by one court, "[t]he employer's manifest intent to avoid double liability in offering disability plans [though specific provision for offset of such benefits from FELA awards] must be respected if the collateral source rule is not to swallow up 45 U.S.C. § 55 at the ultimate expense of employees." *Clark v. Burlington Northern, Inc.*, 726 at 451.

---

[26] Because railroad employees (and other employees covered by FELA) are governed by tort law as opposed to workers' compensation for on-duty injuries, their employers are not legally obligated to furnish medical care in the absence of an adjudication of liability.

In addition, the court below, by voiding the set-off provided in the 1975 collective bargaining agreement and requiring duplicative payments of medical expenses in FELA suits contrary to the intention of the parties, has improperly intruded itself into the collective bargaining process contrary to federal labor policy. As this Court has specifically noted, there is "strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." *Chicago & N.W. R.Co. v. United Transportation Union*, 402 U.S. 570, 579, n. 11 (1971); see also *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982) ("[w]hen neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract"). The decision below, and those of other courts voiding the collective bargaining provision based on their misconstruction of Section 5 of FELA, directly contravene this strong federal policy.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

DAVID P. LEE
NATIONAL RAILWAY LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

HENRY M. MOFFAT
NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL
881 Alma Real Drive, Suite 103A
Pacific Palisades, CA 90272
(213) 459-7659

J. THOMAS TIDD
KENNETH P. KOLSON *
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

May 16, 1986

* Counsel of Record

# APPENDICES

# APPENDICES

## APPENDIX A

### *MEMBERS OF THE ASSOCIATION OF AMERICAN RAILROADS*

*Full Membership*

Alton & Southern Railway

Atchison & Topeka & Santa Fe Ry. Co.
- Central California Traction
- Sunset Railway Company
- Alameda Belt Line RR Co.
- Harbor Belt Line RR Co.
- Kansas City Terminal Railway
- Oakland Terminal Railway
- Texas City Terminal Railway
- Wichita Union Terminal Ry. Co.
- Denver Union Terminal Rwy. Co.

Baltimore & Ohio Railroad Co.
- Akron & Barbeton Belt Railroad
- Curtis Bay Railroad
- Monongahela Railway Co.
- Terminal RR Assn. Of St. Louis

Baltimore & Ohio Chicago Terminal

Bangor & Aroostook Railroad Co.
- Van Buren Bridge

Bessemer & Lake Erie Railroad Company

Birmingham Southern RR Co.

The Lake Terminal RR Co.

McKeesport Connecting Rwy. Co.

The Newburgh & South Shore Rwy. Co.

Burlington Northern Railroad Co.
- Davenport Rock Island & NW
- Iowa Transfer Railway
- Kansas City Terminal

Minnesota Transfer Rwy.
Lake Superior Terminal & Transfer Railway of Wisconsin
Terminal RR Assn. of St. Louis
Portland Terminal RR
Paducah & Illinois
Winona Bridge
Camas Prairie
Burlington Northern Dock Corp.
Burlington Northern (Manitoba LTD)
Denver Union Terminal
Galveston Terminal Rwy.
Longview Switching Co.
Wichita Union Terminal Wy. Co.

Cambria & Indiana RR Co.

Canadian National—Line in U.S.:
Lines in New England
Lines in New York
Lines in Michigan
Lines in Vermont
Minnesota & Manitoba RR

Chesapeake & Ohio Railway Co.
Covington & Cin. Elev. RR & Transfer Bridge Co.
Norfolk & Portsmouth Belt Line RR
Toledo Terminal Railroad
Chicago South Shore & South Bend
Nicholas Fayette & Greenbriar

Canadian Pacific—Line In U.S.:
Lines in Maine
Lines in Vermont
Saulte St. Marie Bridge Co.

Chicago Illinois Midland Rwy. Co.

Chicago & North Western Trans. Co.
Lake Superior Term. & Trans. Rwy. Company of Wisc.

Minnesota Transfer Rwy. Co.
Kansas City Terminal Rwy.
Iowa Transfer Railway
Western Rail Properties

Chicago, Milwaukee, St. Paul & Pac. RR
Davenport Rock Island & NW
Indiana Harbor Belt RR
Kansas City Terminal Rwy.

Consolidated Rail Corp.
Monongahela Rwy. Co.
Pittsburgh, Chartiers & Youghiogheny Rwy.
Akron & Berbeton Belt RR
Calument Western Rwy.
Albany Port Authority
Indiana Harbor Belt RR Co.
Nicholas Fayette & Greenbrier

Denver & Rio Grande Western RR
Denver Union Terminal Rwy. Co.

Detroit & Mackinac Railway Co.

Duluth, Missabe & Iron Range Rwy. Co.

Elgin, Joliet & Eastern Railway

Galveston, Houston & Henderson RR

Grand Trunk Western RR
Grand Trunk Western RR
Central Vermont Railway Co.
Duluth, Winnipeg & Pacific Rwy.

Green Bay & Western RR Co.
Winona Bridge RR
Ahnapee & Western Rwy. Co.

Houston Belt & Terminal Rwy. Co.

Illinois Central Gulf RR
Kansas City Terminal Rwy.
Terminal RR Assn Of St. Louis
Paducah & Illinois

Kansas City Southern Railway
- Arkansas & Western Rwy.
- Kansas & Missouri Rwy. & Term. Co.
- Kansas City Terminal Rwy.
- Fort Smith & Van Buren Rwy. Co.

Lake Superior & Ishpeming RR

Louisiana & Arkansas Railway Co.

McCloud River Railroad Company

Manufacturers Railway Company

Missouri-Kansas-Texas RR Co.
- Kansas City Terminal Rwy.
- Texas City Terminal Rwy.
- Terminal RR Assn of St. Louis

Missouri Pacific Railroad Company
- Doniphan, Kensett & Searchy
- Arkansas & Memphis Rwy. Br. & Term.
- Brownsville & Matamoros Br. Term.
- Kansas City Terminal Rwy.
- Southern Illinois & Missouri Br. Co.
- Texas City Terminal Rwy.
- Terminal RR Assn of St. Louis
- Great Southwest RR Co.
- Chicago Heights Term. Trans
- Weatherford, Mineral Wells & Northwestern Rwy.

National Railroad Passenger Corporation

Norfolk & Western Railway Co.
- Chesapeake Western Ry
- Des Moines Union Ry Co.
- Fort Wayne Union Ry Co.
- Kansas City Terminal Ry
- Norfolk & Portsmouth Belt Line
- Akron & Borherton Belt
- Fairport, Painesville & Eastern
- Terminal RR Assn of St. Louis

Pittsburgh & Lake Erie RR Co.
- Monongahela Railway Co.
- Pittsburgh, Chartiers & Youghiogheny
- Lake Erie & Eastern RR
- Youngstown & Southern Ry Co.

Peoria & Pekin Union Railway

Pittsburgh & Shawmut RR Co.

Prescott & Northwestern RR Co.

Richmond, Frederickburgh & Potomac RR Co.

St. Louis-Southwestern Ry Lines
- Arkansas & Memphis Ry Br. Term
- Southern Illinois & Mo. Br. Co.
- Terminal RR Assn of St. Louis
- Kansas City Terminal Ry. Co.

Seaboard System Railroad Inc.
- Norfolk & Portsmouth Belt Line
- Gainesville Midland RR Co.
- Paducah & Illinois
- Terminal RR Assoc. of St. Louis
- Woodstock & Brockton RR
- Carrollton RR Co.

Soo Line Railroad Company
- Lake Superior Term. & Trans Ry Co. of Wisc.
- Minnesota Transfer Ry Co.
- Saulte Ste Marie Bridge Co.

Southern Pacific Transportation
- Holton Interurban Ry Co.
- Northwestern Pacific Railroad
- Petaluma & Santa Rosa RR
- Visalia Electric RR Co.
- Central California Traction Co.
- Portland Traction Company
- Sunset Railway Co.
- Harbor Belt Line RR Co.
- Portland Terminal Railroad

Southern Railway Company
- Alabama Great Southern RR Co.
- Woodstock & Blockton RR Co.
- Louisiana Southern Railway
- New Orleans Terminal Co.
- Atlanta & East Carolina Ry
- Camp LeJeune RR Co.
- Cincinnati, New Orleans & Texas Pacific
- Central of Georgia RR Co.
- Georgia Northern Ry Co.
- Georgia Southern & Florida Ry
- Live Oak Perry and South Georgia RR Co.
- State University RR Co.
- Interstate RR Co.
- Norfolk & Portsmouth Belt Line
- St. Johns River Terminal
- Tennessee, Alabama & Georgia Ry
- Tennessee Railway Co.
- Carolina & Northwestern RR Co.
- Algers, Winslow & Western
- Terminal RR Assn. of St. Louis

Texas Mexican Railway Company

Union Pacific Railroad Company
- Spokane International RR Co.
- Portland—Traction Company
- Harbor Belt Line
- Kansas City Terminal Ry Co.
- Portland Terminal RR
- Mt. Hood Railway Company
- Camas Prairie
- Denver Union Terminal
- Longview Switching Co.

Union RR Company of Pittsburgh

Vermont Railway Inc.

Western Pacific Railroad Co.
- Sacramento Northern RR
- Tidewater Southern Ry

Central California Traction Co.
Alameda Belt Line
Oakland Terminal Ry

Western Railway of Alabama
Atlanta & West Point

Winston-Salem Southbound
High Point, Thomasville & Denton

Chicago & Western Indiana

SPECIAL CANADIAN AND MEXICAN MEMBERS

Canadian Lines (in Canada)
Algoma Central Railway
British Columbia Hydro & Power Authority
British Columbia Railway
Canadian National Railways
Canadian Pacific Limited
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway
White Pass & Yukon Corporation Ltd.
VIA Rail Canada

Mexican Lines (in Mexico)

Chihuahua Pacific Railway Company
[Direccion General; de Ferrocarriles en Operacion]:

Ferrocarril Sonara-Baja California, S.A. de C.V.
Ferrocarriles Unidos del Sureste, S.A. de C.V.

Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

*Associate Members*

Alaska Railroad (ALASKA)
American Refrigerator Transit Company
Amko Service Company
Apalachicola Northern Railroad Company
Atlanta & St. Andrews Bay Railway Company

Belfast & Moosehead Lake Railroad Company
Boston & Maine Corporation

California Western Railroad
Centromen Puru Incorporated
Chevron Chemical Company
Chicago South Shore & South Bend Railroad
Chicago Rail Link
Cities Services Company Railroad
Cliffs Western Australian Mining Company Pty. LTD. (AUSTRALIA)
Colorado & Wyoming Railway Company

Dardanelle & Russellville Railroad Company
Delray Connecting Railroad Company
Devco Railway (Cape Breton Dev. Corp.—Coal Div.) (CANADA)

East Erie Commercial Railroad
East Jersey Railroad and Terminal Company
East St. Louis Junction Railroad Company
Empressa Minera Del Centro Del Peru Railways (PERU, S.A.)
Essex Terminal Railway (CANADA)

Fepasa-Ferrovia Paulista (BRAZIL, S.A.)
Fruit Growers Express Company

Genesee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company

Hamersely Iron Pty. Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.

India, Gov't of: Ministry of Railways (INDIA)

Japanese National Railways (JAPAN)

Korean National Railroad (KOREA)

Lenawee County Railroad Company, Inc.
Louisiana & North West Railroad Company

Manufacturer's Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummelstown Railroad Company
MidSouth Rail Corporation
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Corporation

New Orleans Public Belt Railroad
Northeast Illinois Railroad Corporation

Pacific Fruit Express Company
Pearl River Valley Railroad Company
Pickens Railroad—National Railway Utilization Corporation
Port Authority of New York & New Jersey (The)
Providence & Worcester Company
Public Transport Commission of New South Wales (AUSTRALIA)

Rede FERROVIARIA Federal S.A. (BRAZIL)
Roberval & Saguenay Railway Company (CANADA)
Roscoe, Synder & Pacific Railway Company

San Diego & Arizona Eastern Transportation Company
Sierra Railroad Company (CALIFORNIA)
Somerset Railroad Corporation
South African Railways (REPUBLIC OF SOUTH AFRICA)

Southern Indiana Railway, Inc.
Spanish National Railway, (RNFE) (SPAIN)

Taiwan Railway Administration (REPUBLIC OF CHINA)
Texas & Northern Railway Company

Upper Merion & Plymouth Railroad Company

Victoria A Minas Railway (BRAZIL)

Wabush Lake Railway Ltd. (CANADA)
Washington Railroad Company

Yancey Railroad Company

## APPENDIX B

THE ORDER OF RAILROAD TELEGRAPHERS
3860 Lindell Boulevard
St. Louis, Mo.

September 16, 1960

Mr. J. P. Tahney, President
The American Railway Supervisors Assn., Inc.
53 West Jackson Blvd.
Chicago 4, Illinois

Mr. R. C. Coutts, President
American Train Dispatchers' Assn.
19 East Huron Street
Chicago 11, Illinois

Mr. A. Philip Randolph, President
Brotherhood of Sleeping Car Porters
217 W. 125th Street (Room 301)
New York 27, New York

Mr. Eugene E. Frazier, President
United Transport Service Employes
444 East 63rd Street
Chicago 17, Illinois

GROUP POLICY CONTRACT GA-23000
AS AMENDED AND EXPANDED

Dear Sirs and Brothers:

Your organization has a number of employes covered by Travelers Group Policy Contract GA-23000, as amended and expanded.

At the present time under that Group Policy Contract the carriers on non-hospital association railroads are pay-

ing $11.05 per month per employe for employe and dependent coverage while the premium cost for such coverage is $13.17 per month per employe, the difference being paid from our Special Account which has been built up over the years primarily through retroactive premium credits. On the hospital association railroads the carriers are paying not to exceed $6.80 per month per employe to the Hospital Association on that carrier for employe coverage; they also pay $4.25 per month per employe for dependent coverage while the premium on that coverage is $6.10 per month per employe, the balance being paid from our Special Account. There are sufficient funds in the Special Account to meet these payments until the close of this policy year, March 1, 1961.

In the agreement entered into on August 19, 1960 by the Eleven Co-operating Railway Labor Organizations with the Carriers' Conference Committees, the Health and Welfare Program is improved, effective March 1, 1961, to provide the same benefits for dependents as the employes receive except for home and office calls, and it also provides coverage for furloughed employes and their dependents for an additional three months. It further provides for a Group Life Insurance Policy for each covered employe of $4,000, effective as of March 1, 1961. The agreement with the Carriers provides that our policy with The Travelers Insurance Company will be amended accordingly.

The new premiums to be paid by the railroads beginning with February 1961 (premiums are paid in one month for benefits in the following month) are as follows:

> On non-hospital railroads the new rate will be $20.31 plus 81¢ for on-duty injuries, plus 70¢ for the additional coverage for furloughed employes and their dependents, or a total of $21.82 per month per employe instead of the $11.05 per month per employe which they are now paying.

The hospital association railroads will pay Travelers $12.73 for dependent coverage and group life insurance for the employe, plus 38¢ for coverage of dependents of furloughed employees for the additional period, or a total of $13.11 per month per employe instead of the $4.25 per month per employe which they are now paying. In addition the hospital association railroads are required to pay up to $7.58 for employe coverage, plus up to 81¢ for on-duty injuries, or a total of $8.39 per month per employe. The hospital association railroad is also required to make arrangements with the Hospital Association on its railroad to take care of the furloughed employes for the additional period of three months.

In other words, the increased cost to all railroads, whether non-hospital or hospital association railroads, is $10.77 per month per employe, $9.96 of which is considered to be in lieu of a wage increase in early 1961 and 81¢ for on-duty injury coverage which is considered a carrier liability.

I am attaching hereto a copy of the agreement of August 19, 1960 which details these changes.

This information is furnished you so that it will be available to you in your current negotiations with the carriers. It will be necessary for all organizations representing employes covered by GA-23000, as amended and expanded, to make similar arrangements for these increased premiums beginning with the month of February 1961 (for benefits beginning March 1, 1961) which are necessary to carry this insurance.

Our Special Account will be so reduced at the end of this policy year that we will be unable to pay any portion of the premiums from that account after January 1961.

Please acknowledge receipt and advise your understanding.

Fraternally yours,

/s/ G. E. Leighty
Chairman
Employes' National Conference
Committee Cooperating
Railway Labor Organizations

Enclosure

NATIONAL RAILWAY LABOR CONFERENCE

Washington, D.C.
March 26, 1964

Mr. Louis J. Wagner, President
Order of Railway Conductors and Brakemen
O.R.C. & B. Building
Cedar Rapids, Iowa

Mr. Charles Luna, President
Brotherhood of Railroad Trainmen
Standard Building
Cleveland 13, Ohio

Gentlemen:

This confirms the understanding we have reached with your representatives, in negotiations on a health and welfare plan to cover employees your organizations represent, as to the handling of on-duty injuries matters.

We understand that the cost of the on-duty injuries factor will be paid from the monies which have been set aside by the Carriers as result of compensated service rendered during the months of January and February, 1964. The "on-duty injuries cost factor" is the amount bid by the insurance companies. We do not anticipate that it will exceed $1.00 per employee per month, but the factor cannot be definitely fixed until insurance proposals are received.

(a) "The above shall apply for a 24-month period commencing on the date the Policy becomes effective." This is stated in paragraph 2(d) of the Memorandum of March 26, 1964.

(b) "The entire $23.00 shall be paid into the escrow fund for the months of January, February and March, 1964." This is stated in paragraphs 2(d) and 2(e) of the Memorandum of March 26, 1964.

(c) "The carriers shall supply the Committee with an accounting of the monies paid in escrow by the carriers for the months of January, February and March, 1964." We understand that the reports which the insurance company is to furnish will meet this specification.

(d) "The Carriers shall definitely assume the entire cost of the on-duty injuries cost factor after the expiration of the initial two-year Policy." This is in accordance with our understanding.

(e) "A separate accounting shall be kept of the experience of the on-duty injuries cost factor, also, the amount of credit to the fund in the form of interest and other accruals." This is in accordance with our understanding, as set forth in paragraph 2(d) of the Memorandum.

(f) "In the event the on-duty injuries cost factor does not consume the entire amount of the monies which was set aside during the months of January and February, 1964, the monies remaining in that fund shall remain a part of the basic reserve of the Health and Welfare Program." This is in accordance with our understanding.

(g) "All of the above shall be reduced to writing." This letter carries out this portion of our understanding.

"Any understanding reached in connection with the above shall in no way relieve the carriers of their responsibility as set forth in the Federal Employers' Liability Act." This is in accordance with our understanding.

Will you please acknowledge receipt of this letter and its correctness as an expression of our understanding.

/s/ [Illegible]
Chairman
National Railway Labor
Conference

/s/ [Illegible]
Chairman
Eastern Carriers' Conference
Committee

/s/ [Illegible]
Chairman
Western Carriers' Conference
Committee

/s/ [Illegible]
Chairman
Southeastern Carriers'
Conference Committee

ACCEPTED:
ORDER OF RAILWAY
CONDUCTOR & BRAKEMEN

/s/ L. J. Wagner
President

/s/ G. H. Harris
Senior Vice President

/s/ C. H. Anderson
General Secretary and Treasurer

/s/ T. M. Walters
Vice President

/s/ [Illegible]
Chairman, Executive Committee

BROTHERHOOD OF
RAILROAD TRAINMEN

/s/ C. Luna
President

/s/ R. E. Severt
Chairman, H. & W. Committee

/s/ R. E. Carroll
Secretary, H. & W. Committee

/s/ R. C. Jordan
Member, H. & W. Committee

/s/ John L. Penderson
Member, H. & W. Committee

NATIONAL RAILWAY LABOR CONFERENCE
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
Area Code: 202-659-9320

March 12, 1975

Mr. John Peterpaul
General Vice President
International Association of Machinists
and Aerospace Workers
Room 814, Machinists Building
1300 Connecticut Avenue, N. W.
Washington, D. C. 20036

Dear Mr. Peterpaul:

As I indicated during our recent discussions respecting health and welfare and related matters, while the carriers are prepared to continue the present benefits provided under Group Policy Contract GA-23000 for a three-year period commencing January 1, 1975, that willingness is conditioned upon the policyholder labor organizations' agreeing to certain changes designed to avoid unnecessary expense without affecting the benefits to the employees or participation of the organizations in the administration of this program.

The changes are:

1. Agreement by the organizations to expeditious use of the amounts in the Special Account to offset premium payments, with the objective of maintaining the necessary balance in the Account consistent with the assurance of continued Medicare premium payments.

2. Agreement in principle to adoption of a premium-plus-account approach to funding GA-23000, provided that further thorough exploration confirms the advice given us jointly by Travelers that the

interests of the Policyholder will not be adversely affected.

3. Inclusion of a subrogation provision similar to that included in the supplemental sickness benefits agreement between the carriers and the Machinists' and certain other organizations.

What we have in mind, as a typical case, is this:

An employee is injured on duty. He sues the employer for $10,000, and includes in his claim $1,000 of medical expenses which have already been paid under GA-23000. If he wins the suit, he should collect $9,000, not $10,000, for otherwise he would be collecting twice for the same thing.

Our understanding is that, in light of the terms agreed to by the carrier, on behalf of your organization you do not object to these changes, but that you do not purport to speak for any other organizations.

If you concur, would you please sign below.

WILLIAM H. DEMPSEY
Yours very truly,
/s/ W. H. Dempsey

/s/ John Peterpaul